WCB – Alberta

Fundamental Breaches of Workers' Compensation Principles

Discussion Paper #4

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WCB Workers' Compensation Board Alberta

Introduction

Penalties are under review at the Workers Compensation Board – Alberta (WCB). With the enactment of Bill 26, the authority to levy penalties has been brought into today's economic reality with the maximum fine now $25,000 for each contravention or for each day or part of a day on which the contravention occurs and continues. Under old legislation, the maximum fine the WCB could levy was $500 for each day or part of a day on which the contraventions occurred. See Appendix A for section 152.1 of the Worker's Compensation Act (Act).

Over the last decade, WCB's use of financial penalties has been limited. The preferred approach was to work with employers to demonstrate business value and achieve voluntary compliance. Unfortunately, there are a group of employers who do not respond to this approach and penalties are a means to change employer behavior and encourage greater accountability of employer responsibilities.

Sharing our implementation plan for our new penalty structure and ensuring our stakeholders have the opportunity for review and feedback is important to us. This discussion paper puts forth our proposed penalty structure for severe offences and provides opportunity for feedback.

Severe Offences

Severe offences are defined as those that compromise the underlying principles of the workers' compensation system. The workers' compensation system is based on a tradeoff between employers and workers. Employers are responsible for funding the system, which pays workers benefits if they are injured on the job. In exchange, employers are protected from lawsuit and financial liabilities arising from workplace injuries.

As such, the WCB is committed to upholding the rights of both workers and employers under the Act. These rights include: fairness, review and appeal of decisions, honesty, courtesy, access to information and confidentiality. With severe offences, the rights of workers are violated and the basic foundation of the system is consequently jeopardized.

WCB's approach is to make the penalty level consistent with the severity of the contravention. Therefore, significantly higher penalty amounts will be levied for severe offences. The penalty amounts will for the most part be no less than $5000 (per employer or incident) and may be as high as $25,000. As an alternative, employers may face prosecution for severe offences. Section 152 of the Act states that employers cannot be subject to both an administrative penalty and prosecution for the same offence (see Appendix A for detailed section of the Act). As such, WCB will have to

consider the nature of the offence and other criteria to determine the most effective and appropriate approach.

Severe penalties will be considered for the following:

- Breach of Confidentiality
- Misrepresentation
- Unauthorized Deductions
- Notice to Produce
- Agreements to Waive Benefits
- Orders Ceasing Employment

Breach of Confidentiality

The WCB has obligations under both the *Workers' Compensation Act* (the "Act") and the *Freedom of Information and Protection of Privacy Act* ("FOIP") requiring it to maintain the confidentiality of personal information in its possession. To assist it in attaining this goal, the Act gives the WCB the power to supervise the use by outside parties of the information it collects as administrator of the workers' compensation system in Alberta.

Section 147(3) of the Act allows workers, employers and their representatives to have access to "information in the WCB's files" for the purpose of conducting reviews or appeals under the Act, but prohibits the use or release of such information for any other purpose (see Appendix A for detailed section of the Act). Breach of section 147(3) is an offence under sections 152 and 152.1 of the Act subject to either prosecution or administrative penalty.

The WCB will consider a breach of confidentiality to have occurred where a worker or employer has requested and obtained access to information on the WCB's files and has released that information to outside parties or used that information for purposes other than a review or appeal under the Act without the prior consent of the WCB. Routine correspondence sent to workers and employers by the WCB is not covered by this restriction, nor is release by a worker or employer of materials containing only their own personal information.

Depending on the context, nature and severity of the offence the WCB will decide whether to proceed by way of prosecution or administrative penalty. Complaints regarding breaches of confidentiality will be referred to the Legal Services Department of the WCB for review. The Legal Services Department will then conduct such further research and investigation as it deems necessary in the circumstances. Based on its findings, Legal Services will make its recommendation to the Director of Legal Services regarding whether prosecution or administrative penalty is warranted in the circumstances and the amount of any administrative penalty. The Director of Legal

Services will then review these recommendations and decide how the matter will proceed.

Where the WCB proceeds by way of administrative penalty, the amount of the penalty will be dependent upon the severity and the particulars of the offence. It is anticipated that during the initial year of enforcement, minor first time offences will be dealt with by penalties in the range of $500.00. More severe, deliberate and repeat offences will be dealt with by penalties up to and including the maximum penalties allowed under the Act ($25,000).

Since breach of confidentiality has been an offence under the Act since 1981, and since the majority of Albertans are already well aware of the importance of the privacy of personal information, it is not expected that extensive effort will be required to communicate with stakeholders regarding this offence. The WCB already receives numerous requests and complaints regarding these issues and the only proposed change will be the active enforcement of the existing confidentiality provisions of the Act.

Misrepresentation

The offence of misrepresentation is defined in section 151.1 of the Act (see Appendix A for detailed section of the Act).

In many cases arising under section 151.1 the WCB will have the option of proceeding with charges for fraud under the Criminal Code or with the equivalent offence under the Act. Given the nature of this offence, it is expected that all cases of this sort will be dealt with by way of prosecution before the Provincial Court.

The process used in proceeding with a prosecution for the offence of misrepresentation is expected to be very similar to that currently employed by the WCB in laying criminal charges for fraud and related offences under the Criminal Code. Where the WCB becomes aware of potential cases of misrepresentation, the Special Investigations Unit ("SIU") will be notified and they will investigate the case. Where the SIU is of the opinion that an offence has occurred the matter will be referred to the Crown Prosecutor's Office, which will determine whether charges will be laid. If a prosecution is initiated by the Crown Prosecutor's Office, that office will be solely responsible for the conduct of the prosecution before the court. The court will be responsible for determining the appropriate penalty to be assessed for parties found guilty of this offence. It is expected that the court will consider the circumstances and severity of the offence in determining the appropriate penalty.

The WCB has prosecuted cases of misrepresentation for many years under the fraud provisions of the Criminal Code. As such it is not considered necessary to engage in an extensive educational initiative regarding this offence. The WCB will review its

correspondence and forms to provide additional warnings of new offences under the Act where warranted.

Notice to Produce

Section 19 of the Act requires that employers respond to WCB inquiries and cooperate with requests for information, records, documents, etc (see Appendix A for detailed section of the Act).

Currently, if an employer does not act in accordance with section 19, they are first sent a "Notice to Produce" warning letter. If the employer does not comply within 15 days, a legal process is initiated. Documents are issued by our Regional and Field Services Unit and served to the employer. If the employer still does not respond to the request, an application is made to the courts to obtain an "Order to Produce".

Notices to Produce are issued rarely. In 2001, approximately 21 "Notice to Produce" letters were sent to employers. Beyond that, the WCB has not actively pursued Order to Produce actions. From a legal and administrative standpoint, this process is costly. Rather, we have relied on a persuasive approach, other remedies and existing penalties to motivate compliance. For example, if a new employer refuses to report insurable earnings information, we will still charge a premium based on a reasonable estimate made on their behalf. We can also prevent the issuance of clearances pending the account being brought into good standing.

Our proposal relies on retaining the existing process. However, if the employer does not meet his obligations after receiving written warning and 15 days notice, we recommend levying a severe penalty of no less than $5,000 per incident. The purpose of the penalty is to provide incentive for employers to cooperate earlier in the process, create a level playing field among all employers and to offset the legal and administrative costs incurred. For employers who continue to ignore the Order to Produce, they will be subject to the maximum penalty amount of $25,000 or prosecution for their violation.

Unauthorized Deductions

Section 139 of the Act prohibits employers from deducting a fee from their workers' wages to cover the cost of workers' compensation insurance (see Appendix A for detailed section of the Act). The fundamental structure of the system is based on an historic tradeoff. In exchange for secure compensation benefits, workers forego their right of lawsuit against employers for workplace accidents. In return, employers pay the full cost of the workers' compensation insurance. Fairness is compromised when workers give up their legal rights yet are obliged to pay premiums.

WCB's authority, under previous legislation, was limited and included the ability to notify an employer of their responsibilities and encourage the return of unauthorized deductions to the worker. If the matter was not resolved, the worker's only recourse was to take legal action against the employer through the courts with a WCB representative present only to serve as a technical expert. As such, the existing process presented little ramification for employers and was not effective in motivating change in behaviour for employers found to be in violation of the Act.

While it is unknown exactly how many employers are engaging in unauthorized deductions, there were at least 24 instances in 2002 where employers were suspected or found to be deducting fees from their workers. Achieving compliance will be a challenge for WCB given that we do not have a system to monitor this behaviour. The only way we become aware is through premium audit results and when advised directly by workers. We suspect that in many instances workers are reluctant to report this for fear that they may jeopardize their employment.

Recent changes in legislation enable us to charge a penalty in addition to collecting the unauthorized deduction and returning it to the worker. In most cases, we expect this will discourage further deductions. For employers who deduct workers earnings, we will levy a severe penalty (of no less than $5000 per employer). Those who continue to neglect their responsibility will be subject to prosecution or the maximum penalty amount of $25,000 for their violation.

Agreements to Waive Benefits

Section 140 of the Act states that no person shall enter into an agreement to waive or forego any of the benefits to which a worker or a worker's dependants are or might become entitled under this Act. Section 140.1 also states that employers cannot discourage workers from reporting accidents (see Appendix A for detailed sections of the Act).

Both parties (employers and workers) have a responsibility to report workplace accidents. Legislation does not allow opting out despite the fact that both the employer and worker may have willingly agreed to do so. This is similar to other insurance companies who require that accidents be reported even if a claim is not being filed (i.e. with automobile insurance).

These agreements have a detrimental impact on the workers' compensation system. Claim costs and history influence an employer's experience record and premium rates. Therefore, employers who do not report claims have a favourable claims record and will benefit from incentives that reward employers (i.e. premium rate discounts or refunds). Another direct result is that the premium rate will not accurately reflect the accident rates of that industry. As well, workers who experience latent injury or disease will have

difficulty since the original injury has never been documented (this can be especially problematic if the injury worsens after a worker moves on to a different employer).

These agreements are difficult for the worker as their livelihood is dependent on the employer and retaining their job is the focus. Workers may feel that they have no choice and will not take action to correct the situation, despite being aware of their rights. While these agreements are not common, they are only detected when advised directly by workers or through claims audit results.

Unfortunately, rising claims costs over the last number of years have created a favorable environment for employer and worker agreements to waive benefits. The intent of a penalty is to act as a deterrent for employers to enter into these agreements. For employers who do, we will levy a severe penalty (of no less than $5000 per employer). Employers who continue to neglect their responsibility will be subject to prosecution or the maximum penalty amount of $25,000 for their violation.

Achieving compliance will again be a challenge for WCB given that workers may be reluctant to advise us of these agreements. Typically, we will discover such agreements through claims audit results or when advised directly by workers.

Orders Ceasing Employment

Section 138 of the Act states that if an employer is in default of payment to the WCB, the WCB may order the employer to discontinue employing any workers until all monies due are paid in full (see Appendix A for detailed section of the Act).

For the majority of employers, payment of premiums is not an issue. For others, we rely on an effective collection strategy and work with employers at the early stages to resolve any potential payment issues.

The collection process involves an escalated approach that begins with telephone contact, written letters (as the length of time in default increases), contacting principals, securing liens against property/vehicles, seizure of property and sale of property. In almost all cases, the matter is resolved at some stage in the collection process and existing avenues are sufficient to gain employer compliance. In rare situations, when all collection avenues have been exhausted and premiums continue to not be paid, an order can be issued to close an employer's business.

There has been only one occasion in recent WCB history where an order has been issued.

We will review each situation to determine the most appropriate response. Where the employer continues to employ workers and operate their business, we will seek to enforce the Order. In addition, WCB will either levy the maximum penalty of $25,000 or consider prosecution through the courts. This recognizes that despite the many opportunities for cooperation provided to the employer, the employer has still refused to cooperate.

Roll-out Strategy

We recommend that communication to employers on severe penalties be provided on a case-by-case basis since these penalties are not expected to be commonplace. The focus would be on informing offending employers of the seriousness of their actions and how they impact the foundation of the workers' compensation system.

Even so, WCB will always continue to educate both employers and workers about the fundamental principles of the workers' compensation system. Through ongoing efforts, both employers and workers will become more aware of their rights and responsibilities. The primary vehicles for communication may include:

- WCB website and updates to publications and fact sheets
- WCB seminars and workshops
- Direct communication to employers by field staff (such as Auditors, Account Managers and Collections Representatives)
- Articles in "Insight" publication

As with other decisions made at the WCB, employers will have an opportunity to request a review of any penalties levied on their accounts. They would follow the normal dispute resolution process with initial contact to a supervisor or manager followed by review at the Assessment Review Committee. The final level of appeal is the Appeals Commission.

Stakeholder Feedback

Sharing our plans for the new penalty structure and ensuring our stakeholders have the opportunity for review and feedback is important to us. Information on the general administrative penalty program has already been posted on our website to initiate the process. A stakeholder session introducing the general topic of penalties was also conducted on November 6, 2002. Two additional workshops, one in Edmonton and one in Calgary, are planned for early February 2003. The focus of the workshops will be to present the WCB model for a penalty program and gather feedback from stakeholders. Once stakeholder views have been considered, implementation of the program will commence.

Next Steps

- Collection of stakeholder feedback – February to April 2003
- WCB approval of penalty program – June 2003
- Communication of penalty program – Third quarter 2003
- Implementation of penalty program – Third quarter 2003

Appendix A – Sections of Workers' Compensation Act

Section 152.1 (new section effective January 1, 2003)

Administrative penalty

152.1 (1) Where the Board is of the opinion that a person has contravened section 19, 33(1), 87, 103, 105, 106, 108, 109, 110, 138, 139, 140, 140.1, 145, 147(3) or 151.1, the Board may by notice in writing given to that person require that person to pay to the Board within the time specified in the notice an administrative penalty in respect of each contravention in the amount set out in the notice.

(2) A person who contravenes a provision referred to in subsection (1) is liable for the administrative penalty for each day or part of a day on which the contravention occurs and continues.

(3) An administrative penalty may not exceed $25 000
(a) for each contravention, or
(b) for each day or part of a day on which the contravention occurs and continues,
as the case may be.

(4) A notice of administrative penalty may not be issued more than 2 years after the later of
(a) the date on which the contravention to which the notice relates occurred, and
(b) the date on which evidence of the contravention first came to the notice of the Board.

Section 152 (changes effective January 1, 2003)

Offence

152 (1) A person who contravenes this Act or a regulation or order made under it is guilty of an offence.

(2) Where a person is guilty of an offence referred to in subsection (1), the person is liable
(a) to a fine of not more than $25 000 and, where the offence is a continuing offence, a further fine of not more than $10 000 for each day during which the offence continues, and
(b) in the case of an individual, to imprisonment for a period not exceeding 6 months in addition to or instead of the fine.

(3) All fines imposed pursuant to this Act shall, when collected, be paid over to the Board and form part of the Accident Fund.

(4) No prosecution for a contravention of this Act shall be commenced without the consent of the Board and no prosecution shall be commenced more than 24 months after the subject-matter of the prosecution arose.

(4.1) A person who pays an administrative penalty under section 152.1 in respect of a contravention may not be charged under this Act with an offence in respect of that contravention.

(5) In the case of a prosecution for a contravention of this Act or the regulations that consists of failing to prepare and forward to or provide the Board with any report, statement or other document or of failing to pay any money to the Board in accordance with this Act, a certificate purporting to be signed by the secretary certifying that the report, statement, document or money has not been received by the Board shall be admitted in evidence as proof, in the absence of evidence to the contrary, of the facts stated in it without proof of the signature or official character of the person signing it.

Section 147 (3) (already in effect)

Confidentiality of information
147 (3) Notwithstanding subsections (1) and (2) and section 34(4), where a matter is being reviewed or appealed under section 46 or 120,
(a) the worker, or the worker's personal representative or dependant in the case of the death or incapacity of the worker, or the agent of any of them, and
(b) the employer or the employer's agent
are entitled to examine all information in the Board's files that is relevant to the issue under review or appeal, and those persons shall not use or release that information for any purpose except for the purpose of pursuing the review or appeal.

Section 151.1 (new section effective January 1, 2003)

Prohibition
151.1 (1) No person shall, in connection with a claim for compensation,
(a) knowingly provide false or misleading information to the Board,
(b) fail to report to the Board, without lawful excuse, the person's return to work, or
(c) fail to inform the Board of a material change in the person's circumstances that may affect the person's entitlement to compensation or other benefits under this Act or the amount of that compensation or those benefits.

(2) No person shall, in connection with an assessment or an employer account,
(a) knowingly provide false or misleading information to the Board, or
(b) have or use a document that purports to be a clearance certificate issued in respect of section 126, 129, 132, 133 or 134 but that was not issued by the Board or is otherwise invalid.

(3) No person shall knowingly make a false or misleading statement or representation to the Board to obtain payment for goods or services, whether or not the Board actually received the goods or services.

Section 19 (effective May 21, 2002)

Prohibition

19 (1) A person shall

(a) make prompt and explicit answers to an inquiry made under section 18(3)(a), and

(b) comply with a notice given under section 18(3)(a).

(2) No person shall

(a) prohibit or interfere with the examination or removal of anything under section 18(3), or

(b) otherwise obstruct, hinder or interfere with the Board, or a person acting on its behalf, in the making of an investigation under section 18.

Section 18 (effective May 21, 2002)

Investigation by Board

18 (3) For the purposes of an investigation under subsection (2), the Board or authorized person

(a) may inquire into and examine

(i) the business affairs of an employer involved in the matter under investigation,

(ii) the books, files, papers, documents, correspondence, records or other things in relation to or connected with an employer involved in the matter under investigation

as they relate to the subject-matter of the investigation, and may give to the employer or the employer's agent notice in writing requiring the employer to bring and produce before the Board or authorized person at a place and time stated in the notice, which time shall be at least 10 days after the giving of the notice, all books, files, papers, documents, correspondence, records and other things in the employer's custody, possession or control that are relevant to the matter under investigation,

(b) may take possession of, examine and remove and take extracts from or obtain reproduced copies of any of the things referred to in clause (a), and

(c) may enter, inspect and examine at all reasonable times any premises or other place, other than a private dwelling, in which an employer carries on business.

Section 139 (changes effective January 1, 2003)

Unauthorized Deductions

139 (1) Except as authorized by this Act, no employer shall, either directly or indirectly, deduct from the wages of the employer's workers any part of any sum that the employer

is or might become liable to pay to the Board or require or permit any of the employer's workers to contribute in any manner toward indemnifying the employer against any liability that the employer has incurred or might incur under this Act.

(2) Where the Board considers that an employer has contravened subsection (1), in addition to any other action that may be taken by the Board pursuant to this Act, the Board may
(a)collect from the employer the amount of any deduction prohibited by subsection (1) as if it were a premium payable under this Act, and
(b) pay the amount collected to the worker from whom it was deducted or who paid it

Section 140 (already in effect)

Agreements to waive Act void
140 No person shall enter into an agreement to waive or forego any of the benefits to which a worker or a worker's dependants are or might become entitled under this Act, and any such agreement is void.

Section 140.1 (new section effective January 1, 2003)

Impeding reporting of accident
140.1 No employer shall, directly or indirectly, by agreement, threats, promises, persuasion or any other means, discourage or impede a worker of the employer, or the worker's dependant, from reporting an accident to the Board.

Section 138 (already in effect)

Board order ceasing to employ workers
138 If an employer is in default of payment of any money due by the employer to the Board and the default continues for at least 30 days, the Board may order the employer to discontinue and subsequently refrain from employing any worker, and the employer shall not afterwards employ a worker until the employer pays to the Board all money due to it from the employer.